Secondly, I would refer to the previous warnings of overloading by the ship.

The owners of Syarikat Kalimantan and the master of the ship had been warned before for carrying excess passengers on June 17, 1974 by letter: —

"This letter (exhibit P9) drew attention of the juragan that there were previous violations of the law against overloading; the dates were 1st December 1973 from Nunukan to Tawau number of passengers 86; 3rd January 1974 number of passengers 94; 7th January 1974 Nunukan to Tawau number of passengers 106; 8th January 1974 Nunukan to Tawau 117 passengers. The same letter informed the juragan that he will be liable to a fine of $1,000 and 6 months' imprisonment...."

and continues: —

"If the owners of the ship listed more passengers than the maximum we refuse to issue the port clearance. We had refused port clearance to 'Nunukan Express' before after we checked the vessel. In such cases the excess passengers were removed from the vessel...."

and further down: —

"There are surprise checks, now and then by the Marine Inspector or the Boarding Officers.

Sometimes I give instructions to check or my staff have commonsense to check. They can check on their own without reference to me... On 4th June there was no such report referred to me in respect of 'Nunukan Express'."

The learned Magistrate has this to say in his judgment at page 3 in *Criminal Appeal No. 15/76*: —

"*PW127 Masri bin Taha* stated positively that passengers and safety certificate dated October 21, 1974 (exhibit P8B) shows 84 passengers (no report was made by any Marine Officer as having been on board to check). A Marine Serang in uniform stood on the deck to look for a relative. He never went inside."

With respect, the lower court has omitted to consider the evidence of *Voo Yaw Lan (PW24).* In this respect I can find nothing in the judgment to indicate that the court had rejected his evidence as being unworthy of credit.

PW24 said: —

"When the vessel was about to leave two officers went into the vessel, one in white uniform and the other in brown uniform... I saw them go into the vessel...."

The question then arises; what were the two officers doing on board the ship? Had they chosen to shut their eyes and closed their ears to what transpired in the ship, and that the place was as one witness observed 'sardine-packed'?

I would here refer to section 169(5) of the Ordinance: —

"Without prejudice to any proceedings under the provisions of subsections (1) to (4) inclusive, any ship which is loaded in contravention of this section may be detained until she ceases to be so loaded."

I now pass to a consideration of the alleged *Absence of Complaint of the Director.* The law on this is to be found in sections 254 and 248 of the Ordinance.

Section 254 of the Ordinance provides: —

"The Director shall be the officer having the general superintendence of the administration of this Ordinance, and authorised to carry the provisions of this Ordinance into execution."

and *Section 248* is in these terms: —

"*No person shall be charged with any offence under this Ordinance,* other than an offence relating to discipline or order on board a ship, *except on the complaint of the Director* or any person authorised in writing in that behalf and...."

It was submitted on behalf of the prosecution that the prosecution had lodged a complaint before the Magistrate. The complaint however was not produced at the trial in the Magistrate's Court although a full hearing took place extending over many days. Nor was the complaint marked as an exhibit. The prosecution has at the High Court before me sought to put in the complaint. It was strenuously objected to by counsel for the defence, and I think rightly so for the reasons given at pages 20 and 21 of the notes. It was I consider rather late in the day, when the complaint ought to have been tendered in the lower court, before the trial began, but the prosecution failed to do so.

It was further the submission of the prosecution that if the complaint was not included in the proceedings now before the High Court the whole proceedings in the lower court would be a nullity with which I wholly agree.

Even assuming that the prosecution and I are both wrong in our views, I would only express the hope that the prosecution ought not in fairness to the appellants to be re-tried again for these offences since they were not only in jeopardy in the first trial, but were convicted and sentenced to which references had been made. To allow the prosecution to do so would I venture to add amount to allowing the prosecution to have a second bite at the cherry.

Order accordingly.

WAH TAT BANK BHD. v. WONG LEE KOK & ORS.

[O.C.J. (Tan Chiaw Thong J.) November 7, 1977]
[Borneo — Civil Suit No. 54 of 1977]

Practice and Procedure — Application for rateable distribution — One attaching judgment creditor — Scope of R.S.C. 1957, O.46A r.1(1)(c).

The plaintiff sought for an order under Order 46A rule 1(1)(c) to have the balance of the proceeds of the sale of ½ share of the 2nd defendant's land paid to him. Before the sale, the plaintiff had attached the land by a prohibitory order. He was the only judgment creditor.

Held, allowing the application: Order 46A rule 1(1)(c) could be construed to cover the present situation where there was only one judgment creditor who, prior to the sale of land, had attached the said land by way of execution.

SUMMONS IN CHAMBERS.

Dr. Chew Peng Hui for the plaintiff.

Tan Chiaw Thong J.: By this *ex parte* summons in chambers, the plaintiff seeks an order to have the balance of the proceeds of sale of the ½ share of the 2nd defendant in that parcel of land together with the building thereon situate at Mission Road, Sibu described as Lot 73, Block No. 5, Sibu Town District, which was sold under order of this court made under Originating Summons No. 60 of 1976, paid to him.

The application is made under O.46A of the Rules of the Supreme Court, 1957, rule 1(1)(c), and

is supported by the affidavit of Dr. Chew Peng Hui, learned counsel for the plaintiff. It is clear from this affidavit that, before the sale mentioned above, the plaintiff had attached the said land by a Prohibitory Order which was registered with the Land and Survey Department. It seems clear from the said affidavit, and that of the 2nd defendant, that, had this been a case where there are more than one attaching judgment creditor, who have not obtained satisfaction of their judgment debt, O.46A, rule 1(1)(c) would have been applicable. The question which falls to be considered is whether O.46A, rule 1(1)(c) covers, or should be construed to cover, the situation, as here, where there is only one judgment creditor who, prior to the sale of the said land, had attached the said land by way of execution. That the said Order and rule recognise the right of rateable distribution where there are more than one attaching judgment creditor is clear. In my view, since there is no other Order or rule expressly covering the instant situation, and having regard to the principle of rateable distribution given recognition by O.46A, rule 1(1)(c), it would seem that it would be fair and reasonable to construe this Order and rule to cover the instant situation where there is only one attaching judgment creditor. This construction, in my view, would be consistent with the principle embodied therein, particularly having regard to the fact that, to construe otherwise would leave the attaching judgment creditor without any provision to fall back on. Accordingly, I would make the order as prayed for. The exact amount to be paid to the plaintiff would be subject to verification of the Assistant Registrar.

Order accordingly.

Solicitors: *Battenberg & Talma.*

YANASENGAM & ORS. v. PUBLIC PROSECUTOR

[A.Cr.J. (Abdul Razak J.) January 19, 1978]
[Kuantan — Miscellaneous Criminal Application No. 8 of 1977]

Criminal Law and Procedure — Bail — Cases under the amendment to the Penal Code by the Penal Code (Amendment and Extension) Act, 1975.

This application raised a fundamental question regarding the granting of bail in cases under the amendment to the Penal Code by the Penal Code (Amendment and Extension) Act, 1975 making punishable offences hitherto punishable with life imprisonment with imprisonment extending to 20 years. It was argued that the effect of the amendment was to make the granting of bail in them a matter of course since they were now punishable with imprisonment for a period of 20 years instead.

Held: the nature and seriousness of these offences speak for themselves the necessity that the old rules before the amendment in the application for bail for offences punishable with life imprisonment must continue to apply if the administration of justice is to have any real effect.

CRIMINAL APPLICATION.

Mrs. Fernandez for the appellant.

Harany bin Mohamed Noor (Deputy Public Prosecutor) for the respondent.

Abdul Razak J.: This is an application for bail for an offence under section 395 of the Penal Code for gang robbery. The application was dismissed but it had raised a fundamental question regarding the granting of bail in cases under the amendment to the Penal Code by the Penal Code (Amendment and Extension) Act, 1975 making punishable offences hitherto punishable with life imprisonment with imprisonment extending to 20 years and I indicated I would deliver a written judgment. Hitherto decided cases have held that in cases punishable with death and life imprisonment bail must not be allowed unless there were very special reasons shown.

The amendment had evoked a controversy as to its effect on the granting of bail in those cases where formerly the offence or offences were punishable with imprisonment for life. In the present application at any rate it was argued that the effect of the amendment was to make the granting of bail in them a matter of course since they are now punishable with imprisonment for a period of 20 years instead. But is this really the intention of the legislature?

The explanatory statement to the Bill states "Except the amendment of section 216, which is for clarification only, these amendments are for the purpose of removing a curious anomaly created by an amendment to the Code by the Criminal Justice Ordinance, 1953, which abolished penal servitude. Penal servitude was a custodial sentence with different attributes from imprisonment. In the result, those sections of the Code providing the punishment of penal servitude for life were amended to read "imprisonment for life". Another section of the Ordinance provided that a sentence of imprisonment for life should be deemed for all purposes to be a sentence of imprisonment for 20 years. Before the 1953 amendment, many sections creating the more serious offences presented the court with the alternative of "penal servitude for life or imprisonment for a term which may extend to 10 years". The amendment created a situation in which the maximum sentence under these sections, although expressed to be "for life", was 20 years, to which there was an alternative sentence not exceeding 10 years. The Federal Court discovered the lacuna, and held that while a court could impose a sentence of 20 years it could not pass any sentence of between 10 and 20 years. To overcome this difficulty it is proposed to make 20 years the maximum prison sentence which can be passed for offences at present punishable with imprisonment for life, and to delete all reference to alternative sentences of imprisonment for life, except for offences under Chapter VI, which are offences in the category of treason. Here the sentence of imprisonment for life remains, with an alternative sentence of imprisonment which may extend to 20 years. This will enable a judge in a case involving extreme danger to the State, to pass a sentence which is defined (new section 130A) to mean imprisonment until the death of the person sentenced, while offering him the alternative, in a less extreme case, of passing a sentence of up to 20 years".

In the context that "imprisonment for life" is still defined as imprisonment for a period of 20 years in the Criminal Justice Act, 1953, the explanatory statement merely bear testimony to the fact, that the amendment was not intended to make the nature of offences